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705.1.1 Indian Child Welfare Act Description

Philosophy

Indian children have a unique political status not afforded other children. As members of sovereign tribal governments, this political status, as well as the history of biased treatment of Indian children and families under public and private child welfare systems, is the basis for the enactment of the Indian Child Welfare Act (ICWA) of 1978, Public Law No. 95-608, 92 Stat. 3069 codified at 25 U.S.C. §§1901-63.

Purpose Of The ICWA

The purpose of the ICWA is to preserve and strengthen Indian families and Indian culture. ICWA establishes "minimum Federal standards for the removal of Indian children from their families and placement in foster or adoptive homes which will reflect the unique values of Indian culture..." 25 U.S.C. §1902. It is through the children that the elders' teachings, values, language, unique practices, and traditions are passed on and preserved. ICWA is a federal law; it supersedes state law where the two are in conflict.

The best interests of Indian children are inherently tied to the concept of belonging, which is key to the theme of temporary and permanency planning. Belonging can only be realized for Indian children by recognition and enhancement of the support networks that exist in the child's extended family, clan, or tribal systems. Permanency develops from identification with these systems through a sense of connectedness.

It is the principles of Child and Family Services to support these purposes through full compliance with and conscious adherence to the requirements of ICWA.

705.2 Determining When ICWA And Related Agreements Apply

Major objectives

Child and Family Services shall make agreements with Indian tribes to implement child welfare programs.

Summary of the Law

25 U.S.C. §1919

States and Indian tribes are authorized to enter into agreements with each other respecting care and custody of Indian children and jurisdiction over child custody proceedings

Procedures

- A. Agreements between states and American Indian/ Alaska Native Tribes:
1. The first step in applying the ICWA is to become familiar with the provisions of the tribal-state agreements, state laws, or principles. The state of Utah presently has agreements with the Navajo Nation and the Ute Indian Tribe.
 2. State law or tribal agreements establish a higher standard of protection for Indian parents than ICWA, and that higher standard must be followed.
- B. Determine ICWA applicability:
1. ICWA applies to "child custody proceedings" in state courts. A "child custody proceeding" is defined as 25 U.S.C. §1903(1), to include: Foster care placements; termination of parental rights; pre-adoptive placements; and adoptive placements.
 2. Proceedings covered by ICWA:
 - a. Foster care placements, 25 U.S.C. §1913(a) and §1912(e);
 - b. Termination of parental rights, 25 U.S.C. §1903(1)(ii);
 - c. Pre-adoptive placements, 25 U.S.C. §1903(1)(iii);
 - d. Adoptive placements (includes conversion from foster care to adoptive placement), 25 U.S.C. §1903(1)(iv);
 - e. Both voluntary and involuntary placements;
 - f. Divorce proceedings in which neither parent will get custody;
 - g. Any transfers of placement;
 - h. Juvenile delinquency proceedings where parental rights may be terminated;
 - i. Status offenses (juvenile delinquency proceedings that involve an offense that would not be a crime if committed by an adult, e.g., drinking, runaway, truancy, etc.).

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3. Proceedings NOT Covered by ICWA:
 - a. Juvenile delinquency proceedings involving violations of criminal law;
 - b. Divorce proceedings where one parents is granted custody, 25 U.S.C. §1903(1).

705.3 Determination Of An "Indian Child"

Major objectives

Child and Family Services shall make diligent efforts to identify every child who is subject to the ICWA.

Summary of the Law

25 U.S.C. §1903 defines an "Indian child" as: Any child unmarried and who is under 18 and is either a member of an Indian tribe or is eligible for membership in an Indian tribe and is the biological child of a member of an Indian tribe, (4). As a sovereign nation, it is the tribe that determines membership. A tribe's determination regarding membership or eligibility for membership is final, conclusive, and binding on the courts.

Procedures

- A. Inquire at Intake in **ALL** cases whether the child/parents are American Indian/ Alaska Natives (AI/ AN). This is important because ICWA requires that "active efforts" be made to provide "remedial services and rehabilitative programs designed to prevent the breakup of the Indian family..." 25 U.S. C. §1912(d). If AI/ AN children are not properly identified early in a case, it is unlikely that the active efforts requirement will be met
- B. Inquire whether the child/parents are AI/ AN at **ALL** stages of the case following Intake. This should include every court hearing and at every change or potential custody change.
 1. This will facilitate the proper management of ICWA cases at an earlier point in the permanency planning process.
 2. It will eliminate the sudden "surprise discovery" that there is an Indian child involved.
- C. If the child's parents are unavailable or unable to provide a reliable answer regarding the Indian heritage of their child, the Child and Family Services worker shall consider the following in determining the child's Indian heritage:
 1. A thorough review of all documentation in the file, including contact with previous workers.
 2. Consultation with relatives/collaterals providing information that suggests the child/parent may be American Indian.
 3. Examination of any other information bearing on the determination of the child's Indian heritage, such as communication from other sources including Indian tribes and organizations.

- 147
148 D. Upon receiving protective custody of an AI/ AN child residing outside the
149 boundaries of the reservation, the Child and Family Services worker shall:
150 1. Contact and staff the case with the State Indian Child Welfare Specialist.
151 2. Inform the Assistant Attorney General that there is reason to believe that
152 the child is an Indian child and subject to the requirements of the ICWA
153 prior to initiating a petition. This will ensure that proper federal
154 requirements of the ICWA and associated procedures are followed.
155 3. Advise the Tribal/Nation's ICWA representative through notice of taking
156 protective custody of the AI/ AN child.
157 a. A Child and Family Services worker should establish tribal contact
158 as early as possible in an ICWA case.
159 b. Child and Family Services workers must work in partnership with
160 tribal social workers throughout the course of a child custody
161 proceeding involving an Indian child. Having the tribe's social
162 worker and tribal attorney on board at the beginning of the case
163 sets the stage for assistance, advice, positive conjoint efforts, tribal
164 intervention, possible transfer of the case, the sharing of critical,
165 culturally relevant resources and information, and maximum input
166 on placement decisions.
167 c. Child and Family Services workers should continually maintain
168 contact with tribal social workers.
169
170 E. Child and Family Services shall gather the following information, if available,
171 from the child or parent or Indian custodian and any other person with
172 knowledge of the child or parent's tribal affiliation. The information will assist
173 in the confirmation or determination of tribal membership:
174 1. The name of the tribe or tribes that the child and parent are a member of
175 or eligible for membership in.
176 2. The tribal enrollment certification, identification numbers, or other
177 documents that show the child and/or parent(s) are a member or eligible
178 for membership in a tribe.
179 3. The birth mother's maiden name, and names of the maternal and paternal
180 grandparents and biological and/or legal father(s).
181 4. Birth dates and birthplaces of the child and parent(s).
182 5. Social security numbers of the child and parent(s).
183 6. Degree of Indian Blood and/or Certificate of Indian Blood (CIB) of child
184 and parent(s).
185 7. If either birth parent was adopted, obtain the name of his or her birth
186 parents (if available).

-
- 187 8. Other information about extended family members including dates of
188 birth and addresses of grandparents, aunts, uncles, cousins, great
189 grandparents, stepparents, and first and second cousins.
190
- 191 F. When the child's tribe has been identified and the above information gathered
192 and documented in SAFE, the Child and Family Services worker will contact (by
193 letter or phone) the tribe's membership/enrollment office to ask them to make a
194 determination whether the child is a member or eligible for membership in the
195 tribe. If the child is connected to more than one tribe, all of the relevant tribes
196 must be contacted.
- 197 1. "Member" is defined by some tribes as a descendent and does not equal
198 enrollment.
199 2. Formal notice to the tribe regarding the court process is still required.
200 3. The tribal worker will work with the Child and Family Services worker
201 once the tribe is notified and throughout the case process.
202
- 203 G. If the tribe does not respond, call the tribal enrollment officer or other tribal
204 employees or officials responsible for, or knowledgeable about, tribal
205 membership.
- 206 1. Several follow-up calls may be necessary as many of the tribes are
207 understaffed.
208 2. Follow the call with a certified letter documenting the conversation.
209
- 210 H. If the tribe responds that the child is not an enrolled member, but is eligible for
211 membership and the biological child of a member of an Indian tribe, the Child
212 and Family Services worker shall:
- 213 1. Request (or assist the family in completing) tribal membership application
214 forms for the child.
215 2. Encourage the child's parents or Indian custodian to enroll the child in the
216 tribe to facilitate cultural ties and establish eligibility for potential tribal
217 benefits.
218
- 219 I. Once a tribe has determined that a child is not a member and not eligible for
220 membership enrollment, ICWA does not apply. The Child and Family Services
221 worker will:
- 222 1. Document all steps taken to determine the child's Indian or tribal
223 ancestry.
224 2. File the tribe's written statement declaring that the child is neither a
225 member of the tribe nor eligible for membership (and the biological child
226 of a member of an Indian tribe).

- 227 3. Incorporate in any court hearing the tribe's written statement declaring
228 that the child is neither a member of the tribe nor eligible for membership
229 (and the biological child of a member of an Indian tribe).
230

- 231 J. If the tribe determines the child is a member or is eligible for membership and
232 the biological child of a member of a federally recognized tribe, ICWA APPLIES.

- 233 1. Some tribes define descendants as "members" for ICWA services. Child
234 and Family Services workers must follow ICWA whenever an Indian child
235 is determined to be a "member" of a tribe.
236 2. If the child was determined to be covered by ICWA (or if eligibility is not
237 yet determined) and there are past or pending custody proceedings, the
238 case must be treated as an ICWA case and is subject to ICWA procedures
239 until the child is determined to be non-Indian.
240

- 241 K. The Child and Family Services worker should document in SAFE:

- 242 1. All inquiries (oral or written) regarding the child's ethnicity.
243

- 244 L. When the child was initially determined to be Indian, the Child and Family
245 Services worker should also document::

- 246 1. Family history chart.
247 2. Tribal enrollment number.
248 3. Tribal ID card.
249 4. Certificate of Degree of Indian Blood (CIB).
250 5. Other evidence such as a letter from the tribe, Bureau of Indian Affairs.
251 6. Documentation from the Indian Health Service, medical clinic or school,
252 etc.
253

705.4 Emergency Removal Of An Indian Child

Major objectives:

When there is an emergency removal, the Child and Family Services worker shall immediately cause an inquiry to be made as to the residence and domicile of the child.

Summary of the Law

25 U.S.C. §1915

If the child is believed to be Indian, the Child and Family Services worker must undertake diligent efforts to place the child during emergency care in a setting that complies with the placement preference set forth in §1915(b) or (c) of the ICWA (including cases involving emergency placements).

Procedures

- A. After making a removal, the following conditions must be immediately considered unless circumstances do not permit such inquiry, and the Indian status of the child must be immediately determined:
 1. If the child is Indian, the name of the tribe and/or band must be determined and the tribe must be contacted.
 2. It is determined by the tribe that has jurisdiction over the child custody proceedings whether the child is domiciled on the reservation.
 3. It is determined that the child is in danger of imminent physical danger or harm.
 4. Determining the status of an Indian child:
 - a. A member of the Indian child's extended family;
 - b. A foster home licensed, approved, or specified by the Indian child's tribe;
 - c. An Indian foster home licensed or approved by an authorized non-Indian licensing authority; or
 - d. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
- B. The Indian child's tribe has the right to establish a different order of placement preferences, and the state court is required to follow the order as long as it is the least restrictive setting appropriate to the particular needs of the child.
- C. Where appropriate in foster care placements, the preference of the Indian child or parent is to be considered.

-
- 294 D. Where a consenting parent requests anonymity, the state court or state shall give
295 weight to the parent's request in applying the placement preferences (25 U.S.C.
296 §1915(c)).
297
- 298 E. Emergency custody is terminated when:
299 1. Removal is no longer necessary to prevent imminent physical damage or
300 harm to the child.
301 2. The appropriate tribe exercises jurisdiction over the case.
302
- 303 F. If termination of an emergency removal is not possible, a court order should be
304 obtained authorizing continued protective custody.
305
- 306 G. The Child and Family Services worker will obtain the following information for
307 inclusion in the petition:
308 1. The name, age, tribal affiliation, and last known address of the Indian
309 child.
310 2. The name and address of the child's parents, Indian custodian (if any),
311 and the tribe(s).
312
- 313 H. If the name and location of the child's parents, Indian custodian (if any), or tribe
314 is unknown, the Child and Family Services worker should document the diligent
315 efforts undertaken to obtain this information.
316
- 317 I. If the name and location of the parent, Indian custodian, or tribe is known, the
318 Child and Family Services worker must obtain from the tribe whether the
319 residence or domicile of the parent, Indian custodian, or child is on or near a
320 reservation, and identify the reservation.
321
- 322 J. Develop a specific and detailed account of the circumstances that led to the
323 conclusion that the child would suffer imminent physical damage or harm.
324 These facts should be well documented.
325
- 326 K. Set forth a specific plan of action describing the "active" reunification efforts that
327 have been undertaken and which are planned to restore the child to his or her
328 parents or Indian custodian.
329
- 330 L. Develop a specific plan of action to physically transfer the child to the
331 jurisdiction of the appropriate Indian tribe pursuant to 25 U.S.C. §1911(b), in
332 cooperation with the tribal social worker.

705.5 Notice

Major objectives:

Child and Family Services must send notice to the tribe(s), the parents, and the Indian custodian whenever a child custody proceeding is initiated.

Summary of the Law

25 U.S.C. §1912(a)

Formal notice of custody proceedings is required by §1912(a) of the ICWA. Congress, in enacting ICWA, recognized that the tribe has a direct interest in its children. The tribe is entitled to notice as a party, because, from an Indian perspective, a child is a sacred and precious resource that belongs to the entire tribe.

Procedures

- A. No foster care placement or termination of parental rights proceeding may be held until the tribe(s), parents, and Indian custodian have received proper notification and ICWA timelines have been followed.
- B. There are specific timelines set forth in §1912(a) of ICWA. This provision states that a custody proceeding cannot go forward until:
 1. At least 10 days after receipt of notice by the parents or Indian custodian, or after 30 days if 20 additional days are requested by the parents or custodian to prepare for the proceedings.
 2. At least 10 days after receipt of notice by the tribe, or after 30 days if the tribe requests an additional 20 days to prepare for the proceeding.
 3. At least 15 days after receipt of notice by the Secretary of the Interior (Bureau of Indian Affairs) if the identity or location of the parent or Indian custodian and the tribe cannot be determined.
- C. Those to receive the ICWA notice of each proceeding are:
 1. Parents.
 2. Indian custodian, if any.
 3. Tribe.
 4. Additional tribes (if the child is affiliated with or eligible for membership in more than one tribe, all tribes should receive notice).
 5. Bureau of Indian Affairs in Washington, D.C. as well as the appropriate Bureau of Indian Affairs area office if identified/location of parents or custodians cannot be determined.

- 372 D. Notice is served by the following:
- 373 1. Notice may be provided by registered mail, returned receipt requested.
- 374 2. Notice must be filed with the court, along with any returned receipts or
- 375 other proof of service.
- 376 3. The case files must be properly documented regarding proof of service.
- 377 4. Even if the tribe does not respond, an official notice is sent of every future
- 378 proceeding.
- 379 5. Even if a tribe replies that it does not wish to intervene in the proceeding,
- 380 notices of every future proceeding are sent.
- 381 6. Determination must be made that the parent was proficient in the English
- 382 language.
- 383 7. If there is a reason to believe that the parent or Indian custodian will not
- 384 understand the notice because of possible limited English proficiency, a
- 385 copy of the notice must be sent to the Bureau of Indian Affairs Area Office
- 386 nearest to the residence of that person, and a request must be made to the
- 387 Bureau of Indian Affairs staff to arrange to have the notice explained to
- 388 that person in the language that he or she best understands. The written
- 389 request must be properly documented in the case file.
- 390 8. If a person is assigned to explain the notice to the parent or Indian
- 391 custodian in the language that is best understood, the details of the
- 392 assistance rendered must be documented in the case file.
- 393

705.6 American Indian/Alaska Native Parent Or Indian Custodian Rights To Legal Counsel

Major objectives:

The Child and Family Services worker shall, at the earliest point in the case, advise the parents or Indian custodian of their right to court-appointed legal counsel.

Summary of the Law

25 U.S.C. §1912(b).

Pursuant to §1912(b) of ICWA, the court is mandated to appoint legal counsel for an indigent parent or Indian custodian in any removal, placement, or termination proceeding

Procedures

- A. Inform the AI/AN parents or Indian custodian of the procedures that must be followed to have legal counsel appointed.
- B. The right to counsel applies in proceedings initiated by the state and those initiated by private parties, such as stepparent adoption proceedings and intrafamily disputes.
- C. The right to counsel also extends to pre-adoptive and adoptive placement preferences.

705.7 Jurisdiction

Major objectives:

- A. In every case involving an Indian child, the Child and Family Services worker must routinely ask the child's tribe whether the child is a ward of the tribal court under any prior tribal court proceedings.
- B. Once it is determined that a case is a child custody proceeding under ICWA and that the child is Indian, it must then be determined which court has jurisdiction.

Summary of the Law

25 U.S.C. §1911(a) and (d).

- A. Exclusive jurisdiction is vested with the tribal court over any child custody proceeding involving an Indian child who:
 - 1. Resides or is domiciled within the reservation or is a ward of the tribal court, regardless of the child's domicile.
 - 2. If an order establishing tribal court wardship is currently in force, the state court must accord full faith and credit to any tribal court orders, records, and judicial proceedings.

Procedures

- A. Concurrent jurisdiction lies with the tribal and state court when a child resides or is domiciled off the reservation and the child is not a ward of the tribal court.
- B. A foster care placement or termination of parental rights proceeding may be transferred to tribal court under §1911(b) of ICWA absent:
 - 1. The tribal court's declination of the case.
 - 2. "Good cause" to the contrary.
 - 3. Objection by a parent.
- C. Some tribes might decline jurisdiction due to limited resources (e.g., no tribal court, or limited medical or mental health services). If a tribe declines jurisdiction, Child and Family Services will still give notice to the tribe.
- D. In every case involving an AI/AN child, the Child and Family Services worker will:
 - 1. Work closely with the Assistant Attorney General and Tribal Attorney to clarify initial jurisdiction.
 - 2. Ask the tribal social worker early in the case whether the tribe would like the jurisdiction to be transferred to their tribal court.

- 459 3. Work closely with the tribal social worker, if the tribe accepts transfer of
460 the case, to coordinate appropriate legal documents required by the state
461 court to effectuate the transfer and to make arrangements for the physical
462 transfer and delivery of the child.
463 4. Continue to involve the tribal social worker, even when a tribe declines
464 transfer of a case. The tribal social worker can play a significant role in the
465 concurrent planning process for the long-term well-being of the child.
466

705.8 Tribes' Right To Intervene

Major objectives:

If the tribe declines jurisdiction, the tribe still will have the right to participate as an interested party or to intervene at any point in the proceeding.

Summary of the Law

25 U.S.C. §1911(c).

ICWA grants the tribe the authority to intervene in any state court foster care placement or termination of parental rights proceeding "at any point in the proceedings."

Procedures

- A. The tribes should be encouraged to intervene early in the child custody proceeding.
- B. The right to intervene extends to voluntary as well as involuntary proceedings.
- C. If the tribe intervenes, it is a party to the proceeding and has the same rights to notice of all hearings and assert its interest, the right of access to court records, the right to retain counsel if it chooses, the right to appeal, the right to present witnesses, to cross-examine witnesses, and to present other relevant evidence at the hearing.
- D. Tribal recommendations should be documented in the case file and court reports.

705.9 Transfer To Tribal Court

Major objectives:

Child and Family Services shall advise parents or Indian custodian that ICWA allows the parent or Indian custodian or Indian tribe to transfer the proceeding to tribal court.

Summary of the Law

25 U.S.C. §1911(a) and (d).

- A. Exclusive jurisdiction is vested with the tribal court over any child custody proceeding involving an Indian child who:
1. Resides or is domiciled within the reservation or is a ward of the tribal court, regardless of the child's domicile.
 2. If an order establishing tribal court wardship is currently in force, the state court must accord full faith and credit to any tribal court orders, records, and judicial proceedings.

Procedures

- A. The state court must transfer, unless the tribal court declines jurisdiction, either parent objects to such transfer, or if the court determines that good cause exists to deny the transfer.
- B. If the parent or Indian custodian requests, either orally or in writing, workers should recommend such a transfer. If not, the grounds on which the worker would oppose a transfer petition must be documented.
- C. If the tribe requests, either orally or in writing, workers should recommend such a transfer. If not, the grounds on which the worker would oppose a transfer petition must be documented.
- D. If any party believes that good cause exists not to transfer the proceeding, they must document in writing their reasons for such belief in the case record and court file.
- E. Written statements must be distributed to all parties so that everybody has the opportunity to provide the court with their views.

705.10 Active Efforts Required To Prevent Family Breakup

Major objectives:

- A. Child and Family Services shall undertake active efforts to provide remedial services to the Indian family subsequent to an investigation and before a decision is made to place the child out of the home.
- B. The rehabilitative effort should take into account the prevailing social and cultural conditions and the way of life of the child's tribe. These requirements are meant to assure that both evaluation of the problem and development of the treatment plan are culturally appropriate and not tainted by cultural bias.

Summary of the Law

No governing statute.

Procedures

- A. The Child and Family Services worker shall offer the provisions of services of a remedial nature designed to rehabilitate and prevent the breakup of Indian families to the same extent that are available to non-Indian families when eligible.
- B. Prior to initiating a petition before a state court for foster care placement or termination of parental rights, the Child and Family Services worker shall undertake active efforts to provide remedial services and rehabilitative programs to the family designed to prevent its breakup.
- C. In determining the type of remedial services that are appropriate, consider the following:
 - 1. Are the Indian child's or Indian parent's cultural values, beliefs, and religious practices tied to the child's Indian tribe?
 - 2. Does the Indian child or parent or Indian custodian maintain cultural ties to an Indian tribe?
 - 3. Is the Indian child or parent or Indian custodian willing to accept services provided by the tribe or an organization such as an AI/AN cultural and/or service center?
 - 4. Is there an organization such as an AI/AN cultural and/or service center that can offer culturally appropriate services to Indian children and their families in close proximity to the Indian child, parent, or Indian

- 565 custodian? Are these services designed to prevent removal or reunify
566 Indian families?
- 567 5. Is the Indian child's tribe able and willing to provide services that
568 eliminate the risk factors that prevent the child from living safely at home?
- 569 6. Is there a contract provider who has access to culturally American Indian
570 programs and/or resources?
- 571
- 572 D. To reduce the potential for cultural bias when evaluating home and family
573 conditions and making decisions affecting Indian children and families, the
574 Child and Family Services worker should involve the tribe and Indian
575 organizations at the earliest possible point of intervention.
- 576
- 577 E. Services in the community specifically designed for Indian families are to be
578 used where available, including resources of the extended family, the tribe,
579 urban Indian organizations, tribal family service programs and individual Indian
580 caregivers, e.g., medicine men or women, and other individual tribal members
581 who may have developed special skills that can be used to help the child's family
582 succeed.
- 583
- 584 F. In order to demonstrate that "active efforts" have been made, the Child and
585 Family Services worker must assure that due consideration has been given to the
586 cultural needs and values of the family and that resources have been diligently
587 sought to provide family services.
- 588

705.11 Active Efforts Versus Reasonable Efforts

Major objectives:

The Child and Family Services worker shall extend to the American Indian/ Alaska Native families an intense level of services to be sure to satisfy ICWA.

Summary of the Law

No governing statute.

Procedures

- A. Definition of Active Efforts – Active efforts mean not just an identification of the problems or solutions, but efforts showing an active attempt to assist in bridging the gap.
1. Do workers consider cultural conditions and way of life of the child's tribe and/or Indian community in making judgments about the family?
 2. Do workers intervene only when supported by relevant, prevailing Indian social and cultural standards regarding intervention in familial relationships by non-family?
 3. Do workers develop a case plan with assistance of parent/custodian that involves use of tribal Indian community resources?
 4. Do workers encourage maintenance of the child in his or her family except where physical or emotional harm may result?
 5. Do workers involve the child, if of sufficient age, in the design and implementation of case plan?
 6. Do workers provide time and resources to prevent family breakup in at least equal measure to time and resources provided to other families?
 7. Do workers assist parents or custodian and child to maintain an ongoing familial relationship?

705.12 Termination Of Parental Rights

Major objectives:

Child and Family Services shall recognize the unique nature of termination proceedings when AI/ AN child is involved. Child and Family Services as petitioner must show the court by evidence beyond a reasonable doubt, including the testimony of one or more qualified expert witnesses, that continued custody of the child by the parent or Indian custodian is likely to result in serious emotional or physical damage to the child.

Summary of the Law

25 U.S.C. §1912(f).

The termination of parental rights standard set forth in 25 U.S.C. §1912(f) of ICWA requires evidence beyond a reasonable doubt.

Procedures

- A. Only where the standard can be satisfied that serious emotional or physical damage is likely to result to the child would termination of parental rights be appropriate and adoption a potentially appropriate plan for the Indian child.
- B. The testimony of qualified expert witnesses is required by the ICWA.
- C. When the ICWA termination standard cannot be met, the permanency plan will need to provide for a different option (e.g., a long-term guardianship, a relative placement, or continued efforts at reunification).
- D. Where a parent is making progress toward reunification by the time of the 12-month hearing, it may be appropriate to continue reunification as the permanency goal.
- E. Any permanency plan developed for an Indian child that provides for out-of-home placement, including an adoptive placement, must comply with the placement preferences outlined in 25 U.S.C. §1915.
 1. The child must be placed in a manner consistent with the foster/pre-adoptive placement preferences established by ICWA, which are:
 - a. Member of the child's extended family;
 - b. Foster home licensed, approved, or specified by the Indian child's tribe;
 - c. Indian foster home licensed or approved by an authorized non-Indian; or

- 657 d. An institution for children approved by an Indian tribe or operated
658 by an Indian organization that has a program suitable to meet the
659 child needs.
- 660 2. In any adoptive placement, preference shall be given, in absence of good
661 cause to the contrary, to a placement with:
- 662 a. A member of the child's extended family;
663 b. Other members of the Indian child's tribe; or
664 c. Other Indian families.
665

705.13 Qualified Indian Expert Witness

Major objectives:

The Child and Family Services worker will enlist a qualified Indian expert witness who is experienced and knowledgeable about Indian culture, childrearing practices, and traditions to render an opinion as to whether an Indian child is suffering from some form of physical or emotional harm because of the behavior of the family.

Summary of the Law

25 U.S.C. §1912(e) and (f).

The testimony of qualified Indian expert witnesses is required by ICWA before a foster care placement or a termination of parental rights may be ordered.

Procedures

A. Child and Family Services workers will:

1. Enlist the State Indian Child Welfare Specialist to serve as an expert witness or contact to help locate a qualified expert witness.
2. Enlist the assistance of the Indian child's tribe in locating persons qualified to serve as expert witnesses.
3. Enlist the assistance of the closest Bureau of Indian Affairs area office in locating persons qualified to serve as expert witnesses.
4. Contact official reservation tribal organizations or urban Indian programs that serve children and families to locate potential expert witnesses.

B. "Qualified expert witnesses" who are routinely relied on in ICWA hearings include:

1. A member of the Indian child's tribe who is recognized by the tribal community as knowledgeable in tribal customs as they pertain to family organization and child-rearing practices.
 - a. Medicine men;
 - b. Medicine women;
 - c. Tribal leaders;
 - d. Tribal ICWA Specialist.
2. A lay person having substantial education and experience in the area of his or her specialty along with substantial knowledge of prevailing social and cultural standards and childrearing practices within the Indian child's tribe.
 - a. Indian Child Welfare workers;
 - b. Day care workers;

- 705 c. Bureau of Indians Affairs resource: knowledge of customs and
- 706 culture of tribes they serve;
- 707 d. Tribal ICWA Specialist;
- 708 e. State Indian Child Welfare Specialist.
- 709 3. A professional person having substantial education and experience in the
- 710 area of his or her specialty along with substantial knowledge of prevailing
- 711 social and cultural standards and childbearing practices within the Indian
- 712 community.
- 713 a. Psychologists;
- 714 b. Psychiatrists;
- 715 c. Social workers;
- 716 d. State Indian Child Welfare Specialist.
- 717

**705.14 Recognition Of Tribal Licensing And/Or Approval Of
Standards For Foster Homes (Utah State Code [§62a-2-117](#))**

Major objectives:

Child and Family Services shall recognize foster homes within and outside Indian country that are certified, approved, or licensed as meeting the foster home licensing requirements under state law.

Summary of the Law

25 U.S.C. §1901-1963.

The ICWA provides that tribes may develop and implement tribal foster home standards. The office shall license tribal foster homes according to standards developed and approved by the tribe.

Procedures

- A. If the tribe has not developed standards, the office shall license tribal foster homes pursuant to this chapter.
- B. Many regional offices will want to make greater efforts and work more cooperatively with tribes to recruit Indian foster care and adoptive homes, and to encourage tribes to develop programs to recruit and license Indian foster care and adoptive homes.

705.15 Higher Standards Of Proof

Major objectives:

Child and Family Services shall recognize these higher standards and will seek to meet the standards when taking custody of an AI/AN child.

Summary of the Law

25 U.S.C. §1901-1963.

ICWA mandates higher standards of proof in child custody proceedings involving AI/AN children than the state's requirements in those cases involving non-Indian children.

Procedures

Through ICWA, Congress declared that an Indian child may not be removed simply because there is someone else willing to raise the child who is likely to do a better job or because it would be "in the best interests of the child" for him or her to live with someone else. Nor can a placement or termination of parental rights be ordered simply based on a determination that the parents or custodians are "unfit parents." It must be that it is dangerous for the child to remain in his or her present conditions.

705.16 Out-Of-Home Placement Of Indian Children

Major objectives:

Child and Family Services workers shall give preference to the foster and pre-adoptive placements, unless the Indian child's tribe has established a different order of placement. The worker should also contact the tribe to discuss tribal placement preferences as early as possible in case development.

Summary of the Law

25 U.S.C. §1915(d).

The preferences and standards recognized are the prevailing social and cultural standards of the Indian community in which the parent or extended family resides or with which the parent or extended family maintains social and cultural ties.

NOTE: The significance of Indian community standards cannot be overemphasized. In enacting this provision Congress realized that even where an Indian child's bond to the parents or custodian is severed, state courts must make every effort to recognize and preserve the tie between the Indian child and the child's tribe in order to protect the future and sustainability of the tribe itself.

Procedures - Documentation

Documentation in the case file should relate indications of the likelihood of serious emotional or physical damage to particular conditions in the home, showing a causal relationship between the conditions and the serious damage that is likely to result to the child.

- A. For example, it is not adequate to show that the parent abuses alcohol. It is necessary to show, because of alcohol abuse, the parent may cause emotional or physical damage to the child.
- B. In cases of placement, document the active efforts that were unsuccessful.
- C. The case record must document that before initiating court proceedings to remove a child, that:
 - a. The conduct or condition of the parent will result in serious physical or emotional harm to the child.
 - b. Efforts were made to counsel and change the parents' behavior, but they did not work.

Procedures - Foster Care/Kinship And Adoptive Placements

- A. ICWA requires:
1. The child must be placed in the least restrictive setting available, 25 U.S.C. §1915(b).
 2. The child must be placed in reasonable proximity to the child's permanent home, 25 U.S.C. §1915(b).
 3. Inquiry must be made of the child's tribe regarding the tribe's customary definition of extended family, 25 U.S.C. §1903(2).
- B. The child must be placed within the foster/pre-adoptive placement preferences established by ICWA, which are:
1. Member of the child's extended family.
 2. Foster home licensed, approved, or specified by the Indian child's tribe.
 3. Indian foster home licensed or approved by an authorized non-Indian.
 4. An institution for children approved by an Indian tribe or operated by an Indian organization that has a program suitable to meet the child's needs.
- C. In any adoptive placement, preference shall be given, in absence of good cause to the contrary, to a placement with:
1. A member of the child's extended family.
 2. Other members of the Indian child's tribe.
 3. Other Indian families.
- D. The Child and Family Services worker should:
1. Contact the tribe to ask if they have a different placement preference than those set forth in ICWA.
 2. Ask the tribal social worker about concurrent planning options early in the case.
 3. File appropriate documents to show that a diligent search was undertaken to follow ICWA's placement preference.
 4. Contact the tribe's social service office for input.
 5. Establish contact with the child's extended family.
 6. Conduct a search of state and county lists of available Indian homes.
 7. Contact other tribes and Indian organizations with available placement resources.
- E. Documentation that must be in the record.
1. If the placement is outside the preferences established by ICWA, the record must document the reason.

2. If any party believes that good cause exists to place the child outside the placement preferences, the reasons for that belief must be documented in the record
3. If there is a finding(s) in a court order of good cause to place a child outside the placement preferences of ICWA, the reasons must be documented in the record

Procedures - Voluntary Placements And Adoptions

- A. ICWA applies to voluntary placements involving public and private agencies. For valid consent to be given, the following conditions must be met:
 1. The child is over 10 days old.
 2. The consent is in writing and recorded before a judge.
 3. The consent is accompanied by the judge's certification that the terms and consequences of the consent were fully explained in detail and fully understood by the Indian parents or Indian custodian.
- B. §1913(b) of the ICWA grants a parent or Indian custodian the right to withdraw consent to the termination of parental rights prior to the entry of the final order of termination.
- C. Consent should be obtained from both parents. If not, the non-consenting parent's rights must be terminated involuntarily in accordance with ICWA.
- D. If the case involved an unwed father and the father sought to acknowledge or establish paternity, the state should acknowledge that paternity.
- E. The consent signed by the Indian parents or custodians should contain:
 1. Name and birth date of child.
 2. Name of child's tribe.
 3. Child's enrollment number or other indication of membership in the tribe.
 4. Name and address of consenting parents or Indian custodian.
 5. Name and address of prospective parents, if known, for substitute care placements.
 6. Name and address of person or agency through which placement was arranged, if any, for adoptive placements.
 7. Parents' right to withdraw consent from termination and regain custody of child before entry of official order.
 8. Parents' / Indian custodian's right to be notified if the adoption is set aside or vacated or otherwise unsuccessful and the right to petition court for custody.

- 879 9. A statement of the parents' right for parental consent to be signed in
880 closed court.
881

705.17 Change Of Placements

Major objectives:

The Child and Family Services worker shall notify the parent and/or Indian custodian and the child's tribe in writing prior to a change in placement or before the foster family moves.

Summary of the Law

No governing statute.

Procedures

If an AI/ AN child in a foster or pre-adoptive placement is to be moved from one placement setting to another or if the foster family moves (requiring a change in placement) the placement preferences shall be followed, unless the child is returned to the parent or Indian custodian from whose custody the child was originally removed.

705.18 Records Of Placement

Major objectives

Child and Family Services shall maintain a written record of each placement of each Indian child and of the efforts to comply with the placement preferences established by ICWA.

Summary of the Law

No governing statute.

Procedures

- A. Written record of placement. This record shall be maintained in SAFE, separate from the court report, and shall contain, at a minimum, the petition or complaint, all substantive orders entered during the proceeding, and the complete record of the placement determination.
- B. Where the placement does not meet the preference priorities, the efforts to find suitable placement within those priorities shall be recorded and documented in detail. Documentation shall also be provided showing that the placement chosen is in the least restrictive setting possible, meets the child's special needs, and as much as possible, in cases of foster care placement, is close to the child's own home.
- C. At any time, upon the request of the Indian child's tribe or the Department of the Interior, Child and Family Services shall make available records of every foster care, pre-adoptive, and adoptive placement of each Indian child maintained by Child and Family Services.

705.19 Involuntary Adoptive Placements

Major objectives:

Child and Family Services shall observe the adoption preferences as indicated in ICWA.

Summary of the Law

25 U.S.C. §1915(a).

§1915(a) of the ICWA outlines the adoptive placement preferences:

1. A member of the child's extended family.
2. Other members of the Indian child's tribe.
3. Other Indian families.

Procedures

- A. The tribe has the authority under §1915(c) to establish, by resolution, a different order of preference.
- B. The county/state or court effectuating the placement must follow the tribe's alternate preference order as long as it is the least restrictive setting appropriate to the particular needs of the child.
- C. Where appropriate, the Indian child's preference or parents' preferences shall be considered.
- D. Where a consenting parent requests anonymity, the court or state agency shall give weight to the parent's request in applying the preferences.
- E. The Child and Family Services worker should contact the tribe very early to ask if they have a different placement preference than those set forth in the ICWA.
- F. Documentation that must be in the record:
 1. If any party believes that good cause exists to place the child outside the placement preferences, the reasons for that belief must be documented in the record.
 2. If there is a finding(s) in a court order of good cause to place a child outside the placement preferences of ICWA, the reasons must be documented in the record.

705.20 Disrupted Adoptive Placements

Major objectives:

Child and Family Services shall notify the tribal authorities in the event of an adoption disruption.

Summary of the Law

25 U.S.C. §1912

The notice should include a statement of their right to return of their child and such petition should be supported by Child and Family Services unless it can be demonstrated that it is not in the child's best interest as defined by 25 U.S.C. §1912.

Procedures

A. Documentation:

1. Written records are to be maintained on each Indian child, separate from the court record, of all placements and efforts exerted to comply with required placement preferences provisions of ICWA.
2. The record should contain:
 - a. The petitions or complaint;
 - b. All substantive orders entered;
 - c. Complete record of placement determination.
3. 25 U.S.C §1915(b) Upon request, the placement records shall be made available to the Indian child's tribe or the Secretary of the Interior.
4. Where required placement preferences have not been followed, make sure efforts to find suitable placements within those priorities are documented in detail.

705.21 Confidentiality

Major objectives:

Child and Family Services shall make routinely available to the AI/AN parent or Indian custodian all reports or other documents that are filed with the court.

Summary of the Law

No governing statute.

Procedures

- A. The Child and Family Services worker should openly consult with the tribal social worker to develop case planning.
- B. Upon request, the placement records shall be made available to the Indian child's tribe or the Secretary of the Interior.
- C. Confidentiality and protection of children and adults should be considered and addressed when providing documents.

705.22 Full Faith And Credit For Public Acts, Records, And Judicial Proceedings Of Tribes

Major objectives:

Child and Family Services shall recognize its responsibility to give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe with regard to Indian custody proceedings.

Summary of the Law

25 U.S.C. §1911(D)

The United States, every state, every territory or possession of the United States, and every Indian tribe shall give full faith and credit to the public acts, records, and judicial proceedings of any Indian tribe applicable to Indian child custody proceedings to the same extent that such entities give full faith and credit to the public acts, records, and judicial proceedings of any other entity.

705.23 ICWA Training

Major objectives:

Regions, contractors, and individual workers shall receive on a regular and ongoing basis training regarding the intent and application of the ICWA. Child and Family Services will encourage other regular participants in the system to obtain or to participate in such training.

Summary of the Law

No governing statute.

Procedures

- A. The State Indian Child Welfare Specialist will set forth a format for training to improve the understanding of ICWA, which will provide a solid working knowledge of ICWA.
- B. The State Indian Child Welfare Specialist will coordinate with the State Training Coordinator to integrate/ICWA into existing and ongoing training for state employees.
- C. The State Indian Child Welfare Specialist will coordinate joint training and dialogue with state and tribal child welfare agencies and court personnel to strengthen existing working relationships.

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